Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Amendment of Part 2 of the Commission's Rules To Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems	)	ET Docket No. 00-258
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use By The Mobile-Satellite Service	)	ET Docket No. 95-18
The Establishment of Policies and Service Rules For the Mobile-Satellite Service in the 2 GHz Band	)	IB Docket No. 99-81
Petition for Rulemaking of the Cellular Telecommunications & Internet Association Concerning Reallocation of 2 GHz Spectrum for Terrestrial Wireless Use	)	RM –

OPPOSITION OF THE BOEING COMPANY

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SUMMARY

Boeing opposes CTIA's petition for reconsideration of its request for a rulemaking to ultimately reallocate the 2 GHz MSS spectrum allocation to third generation terrestrial mobile wireless services. No party, including CTIA, has questioned the viability of Boeing's plan to use its 2 GHz MSS license to provide satellite-based air traffic management services or its need for its full allotment of 2 GHz spectrum to do so. Because the 2 GHz MSS allocation remains in the public interest, licensing for 2GHz MSS operators has just recently concluded, and the 2GHz MSS licensees have not even had a reasonable opportunity to implement their systems to provide service, the initiation of a rulemaking proceeding to potentially reverse these decisions would be arbitrary and capricious.

Further, CTIA has essentially obtained the rulemaking it requested. The Commission's *3G FNPRM* specifically requested comment on reallocation of portions of the 2 GHz MSS bands and did not preclude comment on reallocation of the balance of the 2 GHz MSS allocation. Many commenters, in fact, provided input on reallocation of more than the 10-14 MHz proposed by the Commission or even the entire 2 GHz MSS allocation. And, the 2GHz MSS *Flexible Use* proceeding addresses the issue of the viability of applications proposed to be provided using the 2 GHz MSS allocation.

CTIA's complaints regarding the procedural aspects of the treatment of its petition for rulemaking (namely, that a public notice was required, that a detailed explanation of the Commission's actions was not provided, and that 2 GHz MSS licensing should have been halted pending consideration of its petition) are not fatal to the Commission's disposition of the petition. The need to place petitions for rulemaking on public notice is not absolute, and the actions that the Commission took ultimately accrued to the benefit of CTIA. Further, the

Commission's explanation of its actions was sufficiently detailed and clear by virtue of the fact that it clearly incorporated the detailed reasoning contained in the 2 GHz MSS licensing orders by explicit reference. Finally, the argument that the Commission was obligated to suspend its ministerial licensing function pending resolution of CTIA's petition for rulemaking has no basis in law or sound administrative policy.

In sum, CTIA's petition for reconsideration should be swiftly denied because there is no reasonable basis for the Commission to initiate the requested rulemaking.

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Pursuant to Section 1.429(f) of the Commission's rules, 47 C.F.R. § 1.429(f), The Boeing Company ("Boeing") hereby opposes the Petition for Reconsideration filed by the Cellular Telecommunications & Internet Association ("CTIA") on October 15, 2001.[1] The Commission appropriately denied, in part, CTIA's petition for rulemaking, and to the extent that there were any alleged procedural deficiencies in the Commission's actions, they did not prejudice CTIA

[1] *See Introduction of New Advanced Mobile and Fixed Terrestrial Services; Use of Frequencies Below 3 GHz; Petition for Rulemaking of the Cellular Telecommunications & Internet Association Concerning Reallocation of 2 GHz Spectrum for Terrestrial Wireless Use*, Petition for Reconsideration, ET Docket Nos. 00-258, 95-18, IB Docket No. 99-81 (filed Oct. 15, 2001)("*Petition for Reconsideration*").

because the Commission essentially granted most of the relief that it had requested; *i.e.,* a review of the 2 GHz MSS allocations.

DISCUSSION

More than four years ago, the Commission allocated the 1990-2025 MHz and 2165-2200 MHz bands ("2 GHz band") to the Mobile Satellite Service ("MSS"), effective January 1, 2000.[2] During the 2 GHz MSS allocation and service rulemaking proceedings, the Commission repeatedly held that an additional 70 MHz of paired MSS spectrum in the 2 GHz band was needed and would serve the public interest. The Commission specifically found, based upon a comprehensive record, that this new MSS spectrum will enhance competition in mobile satellite and terrestrial communications services, complement wireless service offerings through expanded geographic coverage, and promote development of regional and global communications.[3] The Commission further determined that satellites are an "excellent technology for delivering basic and advanced telecommunications services to unserved, rural, insular or economically isolated areas."[4]

The 2 GHz MSS licensing and service rules were completed in August of 2000,[5] and licenses were granted just *four months ago*.[6] Having finally received their licenses, the 2 GHz

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[2] *See Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 95-18, 12 FCC Rcd 7388 (1997), *aff'd on recon,* ("*2 GHz MSS Allocation Order*"); *Memorandum* Opinion and Order and Third Notice of Proposed Rule Making and Order*,* 13 FCC Rcd 23949 (1998), *further proceedings*, Second Report And Order and Second Memorandum Opinion and Order, 15 FCC Rcd 12315 (2000) *recon. pending*.

[3] *See 2 GHz MSS Allocation Order* ¶¶ 13-15; *The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, Report and Order, IB Docket No. 99-81, 15 FCC Rcd 16127 ¶¶ 1, 33-34 (2000) *recon. pending*. ("*2 GHz MSS Service Rules Order*").

[4] *See 2GHz MSS Services Rules Order* ¶ 32.

[5] *See generally id.*

[6] *See FCC International Bureau Authorizes New Mobile Satellite Service Systems in the 2 GHz Band,* News Release (rel. July 17, 2001).

MSS operators are proceeding with the development of their proposed systems in order to provide needed services using the 2 GHz MSS band. Unique among the 2 GHz MSS licensees, Boeing plans to use its authorization to provide Aeronautical Mobile-Satellite (Route) Services ("AMS(R)S"), including satellite-based air traffic management ("ATM") services, to the domestic and international aviation communities.

Before any 2 GHz MSS authorizations had even been granted, CTIA petitioned the Commission to initiate a rulemaking proceeding to undo the *entire* 2 GHz MSS spectrum allocation.[7] CTIA's primary justification was the belief that the recently allocated and as-yet-unlicensed spectrum was being "underutilized" and that reallocation to "other uses"—notably third generation ("3G") terrestrial mobile wireless services—would be in the public interest.[8] As is apparent, these claims were made before any 2 GHz MSS applicant had an opportunity to provide the services for which licenses were pending. CTIA now seeks reconsideration of the *3G Further Notice of Proposed Rulemaking* ("*3G FNPRM*") issued, in part, in response to CTIA's petition, to the extent that the Commission only requested comment on the reallocation of portions of the 2 GHz MSS spectrum allocation.[9] Boeing, in its capacity as a 2 GHz MSS licensee, adamantly opposes CTIA's latest request to eliminate the 2 GHz MSS allocation.

I. THE PETITION FOR RECONSIDERATION SHOULD BE DENIED BECAUSE CTIA HAS ESSENTIALLY OBTAINED THE RELIEF IT REQUESTED

The Commission should deny CTIA's petition for reconsideration because CTIA has both explicitly and implicitly been granted the rulemaking it requested. Contrary to the interests

[7] *See Petition for Rulemaking of the Cellular Telecommunications & Internet Association Concerning Reallocation of 2 GHz Spectrum for Terrestrial Wireless Use,* Petition for Rulemaking (filed May 18, 2001)("*Petition for Rulemaking*").

[8] *See generally Petition for Rulemaking*.

[9] *Petition for Reconsideration* at 1.

of Boeing and the other 2 GHz MSS licensees, the Commission granted a significant portion of CTIA's rulemaking request in the *3G FNPRM*.[10] There, the Commission has sought comment on: (1) the immediate reallocation of 10-14 MHz of current 2 GHz MSS spectrum,[11] (2) the potential reallocation of future "abandoned" 2 GHz MSS spectrum,[12] and (3) whether or not at least 40 MHz of 2 GHz spectrum should be retained for MSS.[13]

Moreover, the *3G FNPRM* did not explicitly preclude comment on the reallocation of additional 2 GHz MSS spectrum to terrestrial wireless use. Although the Commission denied CTIA's petition "insofar as it requests reallocation of the entire 2 GHz MSS band,"[14] by asking whether the Commission should retain at least 40 MHz of 2 GHz MSS spectrum,[15] parties were invited to provide comment as to whether less than 40 MHz or even none of the 2 GHz spectrum should be retained for MSS. Indeed a review of the record in the *3G FNPRM* proceeding reveals that a significant portion of the comments have provided input on the potential reallocation of most or even the *entire* 2 GHz MSS band.[16]

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[10] *See Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems; Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, The Establishment of Policies and Service Rules for the Mobile-Satellite Service in the 2 GHz Band, Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service, Petition for Rule Making of UTStarcom, Inc., Concerning the Unlicensed Personal Communications Service,* Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, ET Docket Nos. 00-258, 95-18, IB Docket No. 99-81, RM-9498, RM-10024, FCC 01-224 ¶22 (rel. Aug. 20, 2001)("*3G FNPRM*")("[W]e grant in part…CTIA's petition for rulemaking.").

[11] *Id.* ¶ 24.

[12] *Id.* ¶ 28.

[13] *Id.* ¶ 29.

[14] *Id.* ¶ 23.

[15] *Id.* ¶ 29.

[16] Of the approximately 50 parties filing initial comments in the *FNPRM*, approximately 20 included discussion regarding reallocation of the entire 2 GHz MSS band. Included among these is CTIA itself, a fact which demonstrates the insincerity of its petition for reconsideration. *See* Initial Comments of AT&T Wireless Services,

The initiation of yet another NPRM that duplicates issues already being considered in the *3G FNPRM* and other pending proceedings would be both repetitive and unnecessary.[17] Granting reconsideration of CTIA's petition for rulemaking would lead to unnecessary regulatory proceedings and would be a waste of Commission and industry resources. This conclusion is compounded by the fact that another of CTIA's primary contentions (*i.e.,* the continued viability of the 2 GHz MSS industry) is currently being considered as part of the *Flexible Use Proceeding*.[18]

II. THE PETITION FOR RECONSIDERATION SHOULD BE DENIED BECAUSE THE PROCEDURAL FLAWS ALLEGED ARE NOT FATAL

The procedural complaints in CTIA's petition essentially amount to "biting the hand that feeds it" by challenging the Commission's course of action. It is apparent that the Commission went to great procedural lengths to accommodate and expedite CTIA's request.

Inc., The Boeing Company, Celsat America, Inc., Cingular Wireless, LLC, Constellation Communications Holdings, Inc., Ericsson, Inc., Globalstar, LP, Iridium Satellite, LLC, Lockheed Martin Corporation, Mobile Satellite Users Association, MSTV/NAB, New ICO Global Communications, Orange Group, Satellite Industry Association, Telecommunications Industry Association – Satellite Communications Division, Telephone and Data Systems, Inc., The Progress and Freedom Foundation, TMI Communications and Company, LP, and Verizon Wireless. Of the 30 parties filing reply comments, approximately half commented on the reallocation possibilities of the entire MSS band. *See* Reply Comments of: ArrayComm, Inc., AT&T Wireless Services, The Boeing Company, Celstat America, Inc., Cingular Wireless, LLC, Constellation Communications Holdings, Inc., CTIA, Globalstar, L.P., New ICO Global Communications, Orange Group, The Society of Broadcast Engineers, Inc., TMI Communications and Company, L.P., Space Enterprise Council, and Verizon Wireless. This level of participation is especially significant given the broad array of issues addressed in the *3G FNPRM.*

[17] *See* 47 C.F.R. 1.401(e)("Petitions which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission may be denied or dismissed without prejudice to the petitioner.").

[18] *See Flexible Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz, the L-Band, and the 1.6/2.4 GHz Band; Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service,* Notice of Proposed Rulemaking, IB Docket No. 01-185, ET Docket No. 95-18, FCC 01-225 ¶ 25 (rel. Aug. 17, 2001)("*Flexible Use Proceeding*")("We seek comment on the premise offered by ICO and Motient that allowing terrestrial operations in conjunction with 2 GHz and L-band MSS networks is important to assure the commercial viability of MSS systems.").

A. A Public Notice Was Not Necessarily Required

CTIA's petition for reconsideration criticizes the Commission for failing place its petition on public notice pursuant to Section 1.403 of the rules.[19] This criticism does not warrant a granting of reconsideration for three reasons. First, instead of putting the petition on public notice and initiating an extra round of comments and reply comments on the threshold issue of whether or not to even initiate a rulemaking, the Commission expeditiously included CTIA's petition in the *3G FNPRM*.[20] While the Commission could have been more explicit in documenting its actions and its *sua sponte* waiver of its rules, the ultimate result was that the Commission's actions benefited CTIA by expediting the rulemaking process.

Second, even without public notice regarding CTIA's petition for rulemaking, several parties had actual notice and provided relevant input.[21] Specifically, the Mobile Satellite User's Association, ICO Services, Ltd., AT&T Wireless, Cingular, Sprint Corporation, Verizon Wireless, and Celsat America provided preliminary views regarding CTIA's petition for rulemaking.[22]

Third, the Commission was not required to issue a public notice regarding CTIA's petition for rulemaking, insofar as it denied the petition, if the petition for rulemaking did not

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[19] *See Petition for Rulemaking* at 3. Section 1.403 provides that "[a]ll petitions for rule making…meeting the requirements of § 1.401 will be given a file number and, promptly thereafter, a "Public Notice" will be issued…". *See* 47 C.F.R. § 1.403 (a).

[20] It is established that the Commission may waive the requirement to place a petition for rulemaking on public notice and instead incorporate a petition for rulemaking immediately into an NPRM. *See, e.g., Reallocation of the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands,* Notice of Proposed Rulemaking, ET Docket No. 00-221,RM-9267, RM-9692, RM-9797, RM-9854, 15 FCC Rcd 22657 n. 17 (rel. Nov. 20, 2000).

[21] *See 3G FNPRM* ¶ 20.

[22] *Id.* n. 63.

meet the threshold requirements of Sections 1.403 and 1.401 (e) of the rules.[23] Specifically, pursuant to Section 1.403, the Commission must provide a file number and public notice only for rulemaking petitions satisfying the requirements of Section 1.401.[24] In this case, CTIA's petition, insofar as it requested reallocation of the entire 2 GHz MSS allocation, did not satisfy Section 1.401(e)'s prohibition against moot, premature, repetitive, or frivolous petitions. The Commission should expressly state that CTIA's petition for rulemaking was essentially an impermissibly late filed petition for reconsideration of the 2 GHz MSS allocation order, that it was otherwise premature, repetitive, and frivolous, and that therefore the Commission was not required to issue a public notice.

B. The Commission's Explanation for Its Partial Denial of CTIA's Petition for Rulemaking Was Not Unreasonable

In the *3G FNPRM*, the Commission succinctly stated that the partial denial of CTIA's petition for rulemaking "better serve[s] the public interest with respect to these issues, and [is] consistent with the International Bureau's recent action granting 2 GHz MSS authorizations."[25] CTIA claims that the Commission's treatment of its petition for rulemaking in the *3G FNPRM* was overly vague and insufficient to determine whether the decision was a product of reasoned decisionmaking.[26] Although, *arguendo*, the Commission could have provided a more detailed explanation of its treatment of CTIA's petition, the Commission's explanation was not unreasonably vague.

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[23] *See* 47 C.F.R. §§ 1.401 (e), 1.403.

[24] *See* 47 C.F.R. § 1.403.

[25] *3G FNPRM* ¶ 23.

[26] *See Petition for Reconsideration* at 4-5.

The Commission's explanation does not exceed the bounds of harmless error for several reasons.[27] First, the Commission's failure to provide a more detailed explanation of its actions was not material. There is no shortage of information supporting the Commission's partial denial of CTIA's petition in the balance of the record in the 2 GHz MSS proceedings, including the allocation and service rulemakings, and the many licensing proceedings. Second, in the *3G FNPRM*, the Commission specifically incorporates by reference and adopts the reasoning in the Bureau's authorization orders as the basis for its decision on CTIA's petition for rulemaking.[28] In the 2 GHz MSS authorization orders, the International Bureau specifically addressed CTIA's rulemaking petition and related requests by The Wireless Carriers to defer action on the pending 2 GHz MSS applications.[29] All of the authorization orders repeat the following:

> The Wireless Carriers' request is made only ten months after the Commission established a band plan and service rules for 2 GHz MSS licenses. In making those decisions, the Commission determined that the 2 GHz MSS systems will enhance competition in mobile satellite and terrestrial communications services, complement wireless service offerings through expanded geographic coverage, and promote development of regional and global communications to unserved communities in the United States, including rural and Native American areas, as well as worldwide. The Wireless Carriers request to defer is predicated on the argument that the ICO *Ex Parte* Letter demonstrates a dramatic change from how MSS was originally envisioned and raises questions as to the overall viability of MSS. They contend that we should treat the ICO *Ex Parte* Letter as a major amendment to ICO's LOI, requiring notice and comment. ICO did not, however, seek authority to provide ATC in the context of its LOI, and we do not grant such authority here. The Commission will decide separately whether and how to

[27] *See, Greater Boston Television Corp.,* 444 F.2d at 851 (A reviewing court will not "upset a decision because of errors that are not material, there being room for the doctrine of harmless error.").

[28] *3G FNPRM* ¶ 23.

[29] *See, e.g., Application of The Boeing Company Concerning the Use of the 1990-2025/2165-2200 MHz and Associated Frequency Bands for a Mobile-Satellite System, Order and Authorization*, File Nos. 179-SAT-P/LA-97 (16), 90-SAT-AMEND-98 (20), IBFS Nos. SAT-LOA-19970926-00149, SAT-AMD-19980318-00021, SAT-AMD-20001103-00159, DA 01-1631 ¶ 43 (rel. July 17, 2001)(*referring to ICO Services, Ltd. Letter of Intent to Provide Mobile-Satellite Service in the 2 GHz Bands,* Order, File No. 188-SAT-LOI-97, IBFS Nos. SAT-LOI-19970926-00163, SAT-AMD-20000612-00107, SAT-AMD-20001103-00155, DA 01-1635 ¶ 29 (rel. July 17, 2001)("*ICO Authorization*")).

> proceed with consideration of ICO's ATC concept. ICO may accept or reject this authorization with this understanding.
>
> Further, we do not agree with the Wireless Carriers that either ICO's statements in support of its ATC proposal or CTIA's request to reallocate the 2 GHz MSS bands for other uses require deferral of action on ICO's LOI or the other 2 GHz MSS applications. The Wireless Carriers provide no credible information to demonstrate that the findings made by the Commission last year that 2 GHz MSS is in the public interest are called into question. The 2 GHz MSS applicants continue to pursue their proposed systems based upon amended applications consistent with the Commission's *2 GHz MSS Order*. They should be given the opportunity to succeed or fail in the market on their own merits after expending vast resources over nearly a decade of effort in the ITU and through regulatory proceedings to get this opportunity. A delay in issuance of the licenses would not be in the public interest where it would adversely affect the introduction of competition and new services.[30]

By stating that its partial denial of CTIA's petition is consistent with its recent licensing authorizations, the Commission provided a clear explanation for its actions. Accordingly, the Commission's rationale meets the deferential standard of reasonable clarity.

III. PARTIAL DENIAL OF CTIA'S PETITION FOR RULEMAKING IS NOT UNREASONABLE

CTIA bases its argument that the Commission acted unreasonably in denying its petition for rulemaking on two untenable propositions. First, CTIA relies on the mistaken proposition that the act of filing of a petition for rulemaking somehow prohibits a Bureau from issuing licenses to qualified applicants. Second, CTIA wrongly asserts that the mere allegation of a possible change of circumstances constitutes a "radical" change in factual premises that requires the Commission to revisit its prior determinations. As demonstrated below, CTIA's propositions are unsupported by either law or sound policy. If, in fact, the Commission is guilty of any unreasonable action, it is in granting the CTIA's petition for even a partial reallocation of the

[30] *See id.* ¶¶ 29-31 (citations omitted).

2 GHz MSS band, since there has been no change in the public benefits of 2 GHz MSS systems or in the amount of spectrum required to fully develop such systems.

A. A Bureau Is Not Prevented From Issuing Licenses Simply Because An Adverse Party Files A Petition For Rulemaking

The International Bureau was not obligated to halt all of its processes pertaining to issuing licenses to qualified 2 GHz MSS applicants simply because CTIA filed its petition for rulemaking. [31] Further, CTIA is simply wrong when it asserts that the Bureau's grant of the licenses somehow prejudged the outcome of the petition for rulemaking and was therefore unreasonable. CTIA fails to cite any law or Commission rule to effectively support either of these propositions.

The only two cases cited by CTIA in support of its petition—*Ashbacker* and *Community Broadcasting*—are clearly distinguishable for the following reasons.[32] *Ashbacker* merely stands for the narrow holding that "where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both" is improper.[33] CTIA and its terrestrial wireless constituents, however, were never applicants in the 2 GHz MSS band, and thus *Ashbacker* is, by its terms, inapplicable.[34] *Community Broadcasting* is also inapplicable, since its fundamental holding

[31] *See Petition for Reconsideration* at 6 (stating "[The issuing of 2 GHz MSS licenses] should have been made only after full consideration of the CTIA petition" and "The licensing decisions by the Bureau hinged on proper consideration and resolution of CTIA's petition.").

[32] *See id.* at 6 n.16. By introducing the *Ashbacker* and *Community Broadcasting* cases with the "compare" ("cf.") signal, CTIA itself acknowledges that the cited cases do not directly support its proposition. The cited cases merely support a proposition that is analogous to – but different from – CTIA's proposition. *See* The Bluebook: A Uniform System of Citation (Columbia Law Review Ass'n et al. ed., 17th ed. 2000) at 23.

[33] *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 330 (1945).

[34] At most, CTIA could argue that its terrestrial wireless members might be "prospective applicants" in the 2 GHz band, if the Commission were to accept its reallocation proposal. But the D.C. Circuit has already held that the narrow holding of *Ashbacker* does not apply to prospective applicants. *See Reuters Ltd. V. FCC*, 781 F.2d 946, 951 (D.C. Cir. 1986) ("Ashbacker's teaching applies not to prospective applicants, but *only to parties whose applications have been declared mutually exclusive*.") (emphasis in original); *see also Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, 7 FCC Rcd 4943, 4945 (1992) ("A party seeking to

addresses grants of interim or temporary authority among competing pending applications.[35] Neither CTIA nor its constituent members have any applications on file at the Commission for the use of 2 GHz MSS spectrum, and the licenses issued to qualified 2 GHz MSS operators (such as Boeing) are permanent–not temporary– authorizations. Accordingly, neither case supports CTIA's overly broad proposition that a Bureau cannot issue licenses before resolving a petition for rulemaking.

Furthermore, CTIA's proposition that a Bureau cannot issue licenses once a petition for rulemaking is filed violates sound administrative policy. If true, any party with conflicting interests or disruptive motives could delay and frustrate a qualified applicant's reasonable expectation of the prompt issuance of a license simply by filing a belated petition for rulemaking. The Commission had already found the allocation of 2 GHz MSS spectrum to be in the public interest and had established service rules to license 2 GHz MSS operators.[36] Accordingly, all that was left for the Bureau to do was to determine whether the pending 2 GHz MSS applicants complied with those service rules.[37] There was no need for the Bureau to delay further the issuing of licenses (after applicants had already waited more than four years since filing their initial applications) simply because CTIA wished to make a belated grab for the same spectrum.

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amend the FM Table of Allotments is a 'prospective applicant' until its application is submitted and accepted pursuant to the Commission's Rules.").

[35] *See Implementation of Section 309(j) of the Communications Act*, 14 FCC Rcd 8724, 8738 (1999) (the "fundamental" principle of *Community Broadcasting* is "that interim operators not be allowed to secure a comparative advantage in the permanent licensing proceeding as a result of the interim operation.").

[36] *See 2 GHz MSS Service Rules Order*, 15 FCC Rcd at 16129.

[37] In fact, the Commission was so eager for the Bureau to complete the licensing of 2 GHz MSS systems that it gave applicants only 30 days to amend their applications. *See id.* at 16149 ("We also believe . . . that a three-month amendment period would unnecessarily delay our goal of expediting authorization of these [2 GHz MSS] systems, some of which have been on file since 1994.").

B. Mere Allegation of A Possible Change In Factual Circumstances Does Not Require The Commission To Grant A Petition For Rulemaking

CTIA's second proposition claims that it was unreasonable of the Commission *not* to institute a rulemaking based on allegations by CTIA and a single 2 GHz MSS applicant that certain MSS applications may not be viable.[38] CTIA asserts that these allegations rise to the level of "a serious and material question" of fact and constitute "a radical change" in the factual premise of the 2 GHz MSS allocation.[39] As a result, CTIA alleges, the Commission had no choice but to revisit its prior determinations that 2 GHz MSS serves the public interest.[40]

This is an argument without substance. First, at no time does CTIA suggest that there has been any serious question of material fact regarding the continued viability of Boeing's use of its 2 GHz MSS license to provide satellite-based air traffic management services. Nor does CTIA, or any other party, call into question Boeing's continuing need for its full allotment of requested spectrum in order to fully develop its system. In fact, as demonstrated below, it was *un*reasonable for the Commission to undertake a further rulemaking proceeding to reallocate spectrum needed by Boeing without any demonstration at all of a change of circumstances regarding the viability or continuing spectrum requirements of Boeing's proposed system.

Second, the so-called "evidence" cited by CTIA is nothing more than speculation and innuendo that does not rise to the level of a radical change of factual circumstances. The three cases cited by CTIA in its Petition for Reconsideration[41] – *American Horse Protection Association*, *Geller*, and *Cincinnati Bell* – all involve clearly measurable changes in factual

[38] *See Petition for Reconsideration* at 7-9.

[39] *Id.* at 9.

[40] *Id.*

[41] *See id.* n.24.

circumstances or changes that were acknowledged by the Commission itself.[42] The record here indicates that the Commission in fact does *not* believe that a radical change in circumstances has occurred.[43] The Commission is not, as CTIA argues, obligated to reassess its rules based on the meritless and largely uncorroborated assertions of third parties.

In reality, CTIA is merely wishing that there have been changes in circumstances, by relying exclusively on the statements of a single 2 GHz MSS applicant.[44] All of CTIA's other purported evidence is either pure speculation (it is impossible to judge the financial health of the 2 GHz MSS industry before operators have even had a chance to launch their systems) or irrelevant (the statements of Motient, an L-band MSS operator, have no bearing on the viability or spectrum needs of 2 GHz MSS operators such as Boeing). Thus, CTIA raises no substantive question regarding the viability or continuing spectrum needs of 2 GHz MSS operators, such as Boeing, that warrants initiating a rulemaking procedure.

C. It Is Unreasonable To Initiate Rulemaking To Reallocate 2 GHz MSS Spectrum Absent Any Change In The Viability Of The MSS Licensees Or In Their Spectrum Requirements

If the Commission is guilty of any unreasoned decisionmaking, as alleged by CTIA, it is in initiating a further rulemaking notice which could result in the reallocation of ten to fourteen megahertz of 2 GHz MSS spectrum to other uses.[45] Given the absolute lack of any evidence

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[42] *See American Horse Protection Ass'n v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987) (Department of Agriculture acted unreasonably in refusing to initiate rulemaking when presented with empirical evidence that then-permissible devices violated statutorily-defined standards); *Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979) (per curiam) (Commission erred in refusing to reexamine rules when faced with "undisputed fact" that the consensus agreement that formed the basis of existing rules was no longer in effect); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995) (Commission required to initiate rulemaking where it acknowledges structural separation rules are not needed for one service, but fails to examine why same rules are still necessary for similar service).

[43] *See ICO Authorization* ¶ 31 ("The Wireless Carriers provide no credible information to demonstrate that the findings made by the Commission last year that 2 GHz MSS is in the public interest are called into question.").

[44] *See Petition for Reconsideration* at 9.

[45] *See 3G FNPRM* ¶ 24.

regarding a change in the viability or spectrum requirements of Boeing's system – and the purely speculative nature of evidence regarding other 2 GHz MSS applicants' systems – there was no basis for the Commission to initiate a rulemaking proceeding to reallocate any part of the 2 GHz MSS band to other services. Accordingly, if the Commission were to take any action on reconsideration, it should be to rescind its decision to propose the reallocation of ten to fourteen megahertz of 2 GHz MSS spectrum that is still needed by Boeing, and possibly other 2 GHz MSS operators, to fully develop their systems. The Commission's findings that MSS is in the public interest remain timely and valid, and any determination by the Commission to reassess the 2 GHz MSS allocation so soon after the allocation and licensing of the spectrum would be arbitrary and capricious.

V. CONCLUSION

For all of the foregoing reasons, The Boeing Company respectfully requests that the Commission deny CTIA's petition for reconsideration in the above-captioned proceeding.

Respectfully submitted,

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November 19, 2001

CERTIFICATE OF SERVICE

I, Angela M. Simpson, do hereby certify that a copy of the foregoing **Opposition of The Boeing Company** was mailed this 19th day of November, 2001, via the United States Postal Service, first class, postage pre-paid, to the following:

Michael F. Altschul
Senior Vice President, General Counsel
Cellular Telecommunications & Internet Association
Suite 800
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

___/s/ Angela M. Simpson__
Angela M. Simpson